Filed 2/27/12 The Travelers Property Casulaty Co. v. Computer Sciences Corp. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA et al., Plaintiffs and Respondents, v. COMPUTER SCIENCES CORPORATION, Defendant and Appellant.	B229033 (Los Angeles County Super. Ct. No. BC379446)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Dunn, Judge. Affirmed.

Anderson Kill Wood & Bender, David E. Wood, John L. Corbett and Eric R. Reed for Defendant and Appellant.

Sedgwick, Bruce D. Celebrezze, Matthew C. Lovell and Nicholas J. Boos for Plaintiffs and Respondents.

Defendant and appellant Computer Sciences Corporation (Computer Sciences) appeals from the summary judgment entered against it and in favor of plaintiffs and respondents The Travelers Property Casualty Company of America and St. Paul Fire and Marine Insurance Co. (collectively Travelers), declaring that Travelers had no duty to defend Computer Sciences in a class action suit. Computer Sciences contends: (1) Travelers' duty to defend does not depend on there being a claim in the underlying complaint that Computer Sciences caused the alleged bodily injuries; and (2) the allegations of the underlying complaint can be construed as alleging Computer Sciences was negligent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Computer Sciences licenses "Colossus," a software program used by insurance companies to evaluate bodily injury claims. From August 1, 1996, through August 1, 2000, Computer Sciences was the insured under three commercial general liability policies (the CGL policies) and three umbrella policies purchased from Travelers. Each policy included coverage for "amounts any protected person is legally required to pay as damages for covered bodily injury . . . [¶] . . . [¶] . . . caused by an event;" the policies define an "event" as an "accident."[1] "Protected persons" included the corporation and

---

[1] In full, the coverage provisions read:

"**Bodily injury and property damage liability.**

"We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage, or premises damage that:

- "happens while this agreement is in effect; and
- "is caused by an event."

"*Protected person* means any person or organization who qualifies as a protected person under the Who is Protected Under This Agreement section."

"*Bodily Injury* means any physical harm, including sickness or other disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness or disease:

others. The Right and Duty to Defend provisions of the policies require Travelers to defend against a claim or suit "covered by this agreement."

Computer Sciences and a number of insurance companies were named as defendants in *Hensley v. Computer Sciences Corporation* (W.D. Ark. Mar. 15, 2006, 05-CV-4081 2006 U.S. Dist. Lexis 14651), a class action brought in the Arkansas State Court by a number of automobile insurance policy holders (the *Hensley* litigation). The operative Fifth Amended Complaint (the *Hensley* complaint), filed in February 2005, alleged that the class members sustained bodily injuries in automobile accidents involving uninsured or underinsured motorists starting July 1996, and that the named insurers – the class action plaintiffs' own insurance carriers – undervalued their claims using the Colossus program. The *Hensley* complaint alleged that Computer Sciences fraudulently conspired with the named insurers to conceal errors in the program that caused the bodily injury claims to be undervalued; the complaint sought damages in the amount of the unreimbursed bodily injury damages under theories of civil conspiracy, unjust enrichment, fraud and constructive fraud. Computer Sciences tendered its defense to the *Hensley* complaint to Travelers in July 2007. Travelers accepted the defense pursuant to a full reservation of rights; after further investigation, Travelers denied coverage and filed this action for declaratory relief.

The parties filed cross-motions for summary adjudication of the duty to defend issue. Computer Sciences took the position that Travelers had a duty to defend it in the *Hensley* litigation because the *Hensley* complaint sought to impose liability on Computer Sciences for the "bodily injuries" the *Hensley* plaintiffs suffered in "accidents." Travelers countered that it had no duty to defend because the *Hensley* complaint sought

---

- "Mental anguish, injury or illness.
- "Emotional distress.
- "Care, loss of services, or death."

"*Event* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

damages for economic loss, not bodily injury; and coverage was limited to "accidents" and the *Hensley* complaint sought damages for intentional acts (conspiracy, fraud, and unjust enrichment), not "accidents."

The competing motions for summary adjudication were heard on September 3, 2010. Travelers argued that the basis of the claims against Computer Sciences in the *Hensley* complaint were fraud and conspiracy, not any "accident" causing bodily injury to the *Hensley* plaintiffs. Further, that the measure of damages urged by the *Hensley* plaintiffs was the difference between what they were paid for their bodily injuries, and what they should have received absent the conspiracy to reduce their damages, did not transform the claim into one for bodily injury. Computer Sciences argued that Travelers' duty to defend was predicated on the *Hensley* complaint's claim that Computer Science was "legally liab[le] for bodily injury" damages suffered by the *Hensley* plaintiffs; it was irrelevant that Computer Sciences had not caused the accident that resulted in the bodily injury. The trial court agreed with Travelers, finding it had no duty to defend Computer Sciences in the *Hensley* litigation. Judgment was entered on October 7, 2010; Notice of Entry of Judgment was served on October 18, 2010, and Computer Sciences timely appealed.

DISCUSSION

A. Standard of Review

The standard of review from summary judgment is well settled. " 'We review an order denying a motion for summary judgment de novo. [Citation.] Summary judgment is properly granted when the papers show there is no triable issue of material fact, and the moving party is entitled to judgment as a matter of law. [Citation.]' [Citation.] The interpretation and application of an insurance policy to undisputed facts presents a question of law subject to this court's independent review." (*State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 577 (*Frake*).)

B. Coverage Does Not Extend to Damages for Accidents Caused by Third Parties and Not by Computer Sciences

Computer Sciences contends Travelers had a duty to defend it in the *Hensley* litigation because the *Hensley* complaint sought damages against Computer Sciences for "bodily injuries" the *Hensley* plaintiffs suffered in car "accidents." It argues that whether Computer Sciences caused the car accidents that resulted in the plaintiffs' bodily injuries is irrelevant to the duty to defend under the clear and unambiguous language of the coverage provisions. We disagree.

In construing an insurance contract, our goal is to give effect to the parties' mutual intentions. If the contract language is clear, it governs. If the terms are ambiguous, we interpret them to protect the reasonable expectations of the insured. If the ambiguity cannot be resolved in this manner, we construe the ambiguity against the insurer who drafted the policy and received premiums to provide the agreed protection. (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 321.) The insured has the burden of proving that a claim is within basic coverage. (*Id.* at p. 322.)

The duty to defend is broader than the obligation to indemnify and it arises whenever an insurer ascertains facts that give rise to the possibility or potential of liability to indemnify. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 167; see also *Frake, supra*, 197 Cal.App.4th at p. 577.) The duty is limited by the nature and kind of risk covered by the policy. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 591.) If the underlying claim was not a risk within the policy coverage, there is no duty to defend. (*Ibid*.)

The first step in determining whether the insurer owes a duty to defend is to compare the allegations of the complaint with the terms of the policy. (*Frake, supra,* 197 Cal.App.4th at p. 578.) In *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 311 (*Delgado*), our Supreme Court held that "[u]nder California law, the word 'accident' in the coverage clause of a liability policy refers to the *conduct of the insured for which liability is sought to be imposed* on the insured." (Italics added; see also *Frake, supra,* at p. 579, quoting *Delgado*.)

In *Horsemen's Benevolent & Protective Assn. v. Insurance Co. of North America* (1990) 222 Cal.App.3d 816 (*Horsemen's*), Horsemen's obtained an insurance policy from Bellefonte that excluded accidents happening to any person while racing, exercising or training any horse. Nevertheless, Horsemen's advertised to its members that the policy included such coverage. A jockey injured during a training session filed an action for personal injuries against three members of Horsemen's; the member-defendants tendered the claim to Bellefonte, which filed a declaratory relief action against Horsemen's and the member-defendants. (*Id.* at p. 819.) The member-defendants filed three separate cross-complaints against Horsemen's for misrepresenting the extent of coverage under the Bellefonte policy. Horsemen's tendered defense of those cross-complaints to its general liability carrier, Insurance Company of North America (INA). INA denied coverage and refused to defend Horsemen's against the cross-complaints. Horsemen's filed suit against INA for, among other things, bad faith breach of contract. The appellate court affirmed summary judgment entered in favor of INA, reasoning that INA had no duty to defend or indemnify Horsemen's: While "the claim against the [Horsemen's member-defendants] was because of personal injury, [the member-defendants'] cross-complaints against Horsemen's was because of misrepresentation and fraud. These claims cannot be considered as constituting claims for personal injury or property damage as contemplated by the INA general liability policy." (*Id.* at p. 821.)

Our analysis begins with a comparison of the allegations of the underlying complaint with the coverage provisions of the insurance policies. First, the complaint: the conduct for which the *Hensley* complaint seeks to impose liability on Computer Sciences is marketing a software program that undervalued the plaintiffs' bodily injury claims; it does not allege that the plaintiffs' bodily injuries were caused by any conduct of Computer Sciences. On the contrary, there is no dispute that the accidents resulting in the bodily injuries were caused by third parties. Next, we turn to the coverage provisions: the policies provide coverage for "bodily injury . . . [¶] . . . [¶] . . . caused by an event," defined by the policy as "an accident." Under *Delgado* and *Frake*, therefore, the policies covered "bodily injury that is caused by conduct of the insured for

which liability is sought to be imposed on the insured." Thus, under *Delgado*, the insurance policies do not provide coverage for the claims in the *Hensley* complaint because those claims do not seek to impose liability on Computer Sciences for conduct that caused bodily injury. Accordingly, Travelers has no duty to defend Computer Sciences against those claims.

Our conclusion under *Delgado* and *Frake* is consistent with *Horsemen's*. Here, as in *Horsemen's*, the event that set the parties' dispute in motion was someone suffering bodily injury. But in both cases, the action against the insured was not for causing that bodily injury, but for fraud (and in this case, conspiracy and unjust enrichment, too). That damages for bodily injury was a measure of the plaintiffs' economic loss in both cases (in *Horsemen's*, the members sought indemnification for the damages they had to pay the jockey and here the *Hensley* plaintiffs sought the difference between what they received as damages and what they believed they should have received), did not transform either action into one for bodily injury under the insurance policies.

We are not persuaded otherwise by Computer Sciences's argument that *Delgado* and *Frake* are inapposite because the issue in those cases was whether a physical assault was an "accident" within the meaning of the coverage clause, not whether the insured could be held "liable for bodily injury or property damage caused by the conduct of someone else, as is the case here." Here, there is nothing to suggest that the parties intended the policies to extend coverage for conduct, here causing an accident, of other than "protected persons."

We do not agree with Computer Sciences that *Horsemen's* was implicitly disapproved by our Supreme Court in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. In that case, the insured (Vandenberg) was the subject of a lawsuit alleging that underground oil storage tanks he installed on property he leased for 30 years had caused property damage by contaminating the property. The various tort claims were settled, but the breach of lease cause of action was submitted to binding arbitration. The insurance companies refused to indemnify Vandenberg for the $4 million arbitration award because it was based on breach of lease contract, which the insurers argued was not covered under

the policies. Our Supreme Court concluded coverage was not precluded for losses pleaded as contractual damages. (*Id*. at p. 838.) It reasoned that a reasonable lay person would understand the term "legally obligated to pay as damages" to refer to any obligation, whether pursuant to tort or contractual liability. (*Id*. at p. 840.) There was no dispute in *Vandenberg* that conduct by the insured caused the property damage that was the basis of the underlying litigation. The holding of *Vandenberg* was that it is not the form of the action (e.g., tort or breach of contract) but the injury caused by the insured that governs. (*Id.* at p. 841.) Vandenberg's potential liability was based on having contaminated land owned by Boyd, its lessor. The court held that since the contamination was a covered event, it did not matter whether the plaintiff's legal theories were tort or breach of lease contract. Either way, the insurer could be liable for indemnification. Thus, contrary to Computer Sciences's assertion, *Vandenberg* did not implicitly disapprove the holding in *Horsemen's* that fraud claims cannot be construed as claims for bodily injury.

Nor are the out-of-state cases relied on by Computer Sciences for a contrary result persuasive. We do find one federal case helpful. In *Holman Enterprises v. Fidelity and Guaranty Insurance Company* (D.N.J. 2008) 556 F.Supp.2d 466, the Holman parties rented a passenger van to Clinton, who also purchased a supplemental insurance policy with $1 million of coverage for bodily injury; but, the policy excluded coverage for bodily injury to relatives of the insured. Clinton was driving the van and the plaintiffs, all of whom were related to Clinton, were passengers when there was an accident and the plaintiffs were seriously injured. The plaintiffs brought the underlying action against the Holman parties, alleging they were negligent and, alternatively, intentionally fraudulent in leading the plaintiffs to believe that the scope of coverage of the policy purchased by Clinton was broader than the actual coverage provided by the policy. The plaintiffs sought as damages the $1 million that they were unable to recover under the policy purchased by Clinton. The Holman parties tendered the underlying action to their insurer, who denied coverage under the Holman parties' umbrella policy. The Holman parties filed suit against their insurer seeking a declaratory judgment that its umbrella

policy provided coverage of the claims in the underlying action. The federal district court entered summary judgment in favor of the insurer, reasoning that there was no direct causal connection between the bodily injury suffered by the plaintiffs, and their economic loss claims for fraud against the Holman parties. (*Id.* at pp. 471-472.) As was the case in *Holman*, there is no causal connection between the injuries suffered by the *Hensley* plaintiffs and the claims against Computer Sciences.

Finally, we observe that Computer Sciences's efforts to find coverage in their CGL policies for the claims made by the *Hensley* plaintiffs conflates two different kinds of insurance: errors and omissions insurance or directors and officers liability insurance (D&O), and CGL insurance. As explained in Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) paragraph 7:1555, page 7F-2 (rev. #1, 2011): "CGL policies cover the insured's liability for bodily injury and property damage to third parties. D&O policies generally cover loss resulting from wrongful acts of officers and directors and specifically *exclude* bodily injury and property damage." The essence of the underlying plaintiffs' claims against Computer Sciences is the company's wrongful acts of conspiracy and fraud, which interfered with those plaintiffs' ability to receive fair compensation from plaintiffs' insurers. Indeed, the record shows that Computer Sciences's errors and omissions policy paid $45 million to Computer Services in settlement of these claims

C. The Hensley *Complaint Does Not Allege Any Negligent Conduct by Computer Sciences*

Recognizing that a policy holder is not entitled to coverage for liability caused by his or her willful acts, Computer Sciences contends the *Hensley* complaint alleges conduct by it that could be characterized as negligent. For example, Computer Sciences argues, the complaint alleges Computer Sciences marketed the software without modifying its design with the intent to defraud the *Hensley* plaintiffs, but the failure to modify could be found to have been negligent. We disagree.

Computer Sciences relies on *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1078 (*Horace Mann*) for the proposition that there is a duty to defend when a policy holder's allegedly intentional conduct could be found to be merely negligent. That is not the holding in *Horace Mann*. In that case, a student and her parents sued her teacher alleging injuries caused by the teacher's intentional and negligent misconduct towards her. The teacher, who previously pled no contest to one count of sexual molestation, was covered by an educator's liability policy that "covered damages 'which the insured shall become legally obligated to pay as a result of any claim arising out of an occurrence in the course of the insured's educational employment activities, and caused by any acts or omissions of the insured . . . .' " (*Id*. at pp. 1079-1080.) The insurer filed a declaratory relief action, alleging that there was no coverage under the policy because the teacher's alleged conduct was intentional and was not in the course of the teacher's educational activities. In opposition to the insurer's motion for summary judgment, the student introduced a letter written by her lawyer to the insurance company, listing 25 acts of misconduct, including giving the student tardy notes at the student's request, pulling her out of classes and allowing her to be in the band room alone. Our Supreme Court reversed summary judgment in favor of the insurer reasoning that, on its face, the student's complaint alleged negligent conduct. Although there had been one act of excluded sexual molestation, "there remained unresolved factual disputes concerning [the teacher's] conduct apart from his molestation of [the student], and, with those disputes, the potential for liability under the policy." (*Id*. at p. 1083.)

Horace Mann is inapposite to this case because unlike in *Horace Mann*, here there was no allegation that Computer Sciences was negligent. The argument that the alleged intentional conduct may have been merely negligent does not create a negligence claim where none is pled.

Finally, Computer Sciences argues that our holding would seriously undermine coverage in vicarious liability cases. The present case does not involve vicarious liability and we see no application here.

DISPOSITION

The judgment is affirmed. Travelers shall recover its costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.